FIRST APPEAL No. 204 OF 1998

Against the Judgment and Decree dated 06.03.1998 passed by Sri Satyendra Prasad Singh, Sub Judge-III, Katihar in Title Suit No.44 of 1995 / 8 of 1997.

SURENDRA PRASAD MAHTO & ORS ……. Defendants-Appellants

Versus

ANANDI DEVI & ORS …… Plaintiffs-Respondents

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For the Appellant : Mr. Mritunjay Kumar Singh No.2, Advocate

For the Respondent : Mr. Sandeep Mishra, Advocate

Dated : 28th day of June, 2011

P R E S E N T

THE HON'BLE MR. JUSTICE MUNGESHWAR SAHOO

J U D G M E N T

Mungeshwar Sahoo, J.

1. The plaintiff-respondent, Shivlal Mahto since deceased filed Title Suit (Partition) No.44 of 1995 / 8 of 1997 for the partition of the suit properties detailed in Schedule 'A' and 'B' of the plaint claiming to the extent of 1/4th share.

2. The plaintiff's case in short is that late Laxmi Narayan Mahto father of the plaintiff were 4 brothers. All of them have died. They were separate in mess and cultivation. Laxmi Narayan Mahto died in 1949 leaving behind 4 sons namely, the plaintiff and defendants who came in joint possession of ancestral lands. Awadh Bihari Mahto, defendant No.1, was *karta* of the family consisting of the 4 brothers. Out of the income of

ancestral properties, the defendant acquired properties mentioned in Schedule 'A' and 'B' of the plaint either in the joint name of the 4 brothers or in his own name alone. He continued as *karta* till 1964. He had no separate source of income. The properties acquired in his own name are also the joint family properties and are in possession of the parties. In 1965, some dispute arose and then all the 4 brothers separated in mess and worship and started separate cultivation according to convenience but there was no partition by metes and bounds. One Bishwanath Singh son of late Ruch Narayan Mahto filed partition suit No.1 of 1994 against all the co-sharers including the plaintiff and defendants but after some time, the said suit was withdrawn. The ancestral properties which were allotted to Laxmi Narayan Mahto came in possession of the parties since 1953 which has been detailed in Schedule 'B'. The defendant No.1 sold some joint family property, therefore, the same may be deemed allotted in the share of defendant No.1. The plaintiff demanded partition from the defendant No.1 who refuse to partition. Therefore, the plaintiff filed the suit for partition.

3. The defendant No.1, Awadh Bihari Mahto filed a contesting written statement. Besides taking various legal and ornamental please mainly contended that the defendant No.2 & 3 are in collusion with the plaintiff and that there is no joint family consisting the plaintiff and the defendants. All the 4 brothers are separate in mess and cultivation having no concern with each other. The suit is bad for non-joinder of necessary party. According to him, there had already been complete partition between the 4 brothers of their father. Kamla Prasad filed title money suit No.7 of 1940 and delivery of possession of all the properties of late Laxmi Narayan Mahto was taken by him in 1945. The appeal filed by Santlal Mahto and others being No.47 of 1942 was dismissed. Thereafter Second

Appeal No.81 of 1950 was filed before Supreme Court which was allowed and thereafter the possession of the property was re-delivered in the year 1953 and the present plaintiff and his brothers came in possession jointly. Further, late Laxmi Narayan Mahto died in 1943 and not in 1949. Triveni Mahto was born within six months of the death of Laxmi Narayan Mahto. The defendant No.1 became the *karta* of the joint family property only for two years. Prior to 1953 after death of late Laxmi Narayan Mahto, the defendant No.1 was maintaining the family out of his personal income, i.e., he was working as Amin and also cultivating the lands on *batai* so he could not acquire any property during this period. When the ancestral property reverted back to the possession of the plaintiff and defendants in 1953, the plaintiff Shivlal Mahto started working as school teacher and he was not parting with his income for the joint family and demanded partition of the ancestral land taking the youngest brother, Triveni Mahto in his side. Thereafter in 1957, 4 brothers amicably partitioned the ancestral property equally. Their mother died in 1956. Since after partition in the year 1957, they are coming separately in possession of their share and acquired the properties separately and they also acquired some property jointly giving contribution. The said properties, which were acquired jointly in the name of 4 brothers on contribution after partition, have also been partitioned after purchase. The other allegations about kartaship till 1964 were denied by this defendant. The further case of the defendant No.1 is that there had already been partition between the 4 brothers of Laxmi Narayan Mahto in the year 1938. In the year 1957, the plaintiff and the defendants have divided the properties of Laxmi Narayan Mahto by metes and bounds. Thereafter, they acquired the properties in their name out of their own income. The defendant No.1 is a qualified Amin working as such since

1937. He had good earning and out of the said earning, he maintained the entire family from 1943 to 1953. He acquired the properties in his own name out of his person income from Amanat. In the written statement, this defendant has given schedule 'A', 'B' and 'C' lands which was allotted to the plaintiff, Shivlal Mahto, Triveni Mahto and Thakur Mahto in partition in the year 1957.

4. The defendant No.2 and 3 filed a supporting written statement supporting the case of the plaintiff.

5. The learned Court below on the basis of the aforesaid pleading framed the following issues :

(i) Is the suit as framed, maintainable?

(ii) Has the plaintiff got any cause of action for the suit?

(iii) Is the suit bared by law of limitation?

(iv) Whether there had been partition by metes and bounds between parties in 1957 or not?

(v) Whether defendant No.1 was acting as *Karta* of the joint family consisting of his brothers after death of his father Laxmi Narayan Mahto till 1964-65?

(vi) Whether the suit lands are joint family property of the parties?

(vii) Whether there is unity of title and unity of possession with respect of suit land between parties?

(viii) Whether the defendant No.1 acquired lands of R.S. plot no.2322, 5152, 5163, 6240, 245 from the aid of joint family fund whether they are self acquired property?

(ix) Whether they are his self-acquired property from his own income?

(x) Whether the land mentioned in Schedule 'B' of plaint were purchased by Ayodhya Singh of village-Bharkhal in benami name of defendant no.1 or whether those lands were purchased by defendant no.1 from the joint family fund?

(xi) Is plaintiff entitled to get decree for the partition, if so to what extent?

(xii) To what this relief or reliefs, the plaintiff is entitled to get?

6. While deciding issue No.5, the learned Court below came to the finding that the defendant No.1 was the *karta* of the family till 1965. It may be mentioned here that this issue No.5 has been dealt with in the Judgment from paragraph 11 but by mistake it has been typed as issue No.4. The finding is recorded as paragraph 21. The learned Court below while deciding other issues observed that it does not stand to reason that when there was partition in 1957 why the lands were acquired jointly after 1957 and before 1965 and, therefore, the learned Court below held that this aspect of the matter conclusively proved that these lands, i.e., schedule 'A' lands are not self-acquisition of defendant No.1 vide paragraph 28. The learned Court below also found at paragraph 38 that there was disruption in the joint family in 1965 but there was no partition by metes and bounds of agricultural lands and thus decided the issue No.4 & 6 and 7 & 8 in favour of the plaintiff. The learned Court below also found at paragraph 51 that schedule 'B' lands were purchased by the defendant No.1 from joint family fund which he illegally and intentionally sold those lands to Updesh Prasad Singh for consideration in which the other 3 brothers had equal shares. Accordingly, the learned Court below decreed the plaintiff's suit.

7. It may be mentioned here that during the pendency of this appeal, the defendant No.1, Awadh Bihari Mahto who was sole appellant died and his legal representatives have been substituted. Likewise the sole plaintiff Shivlal Mahto who was respondent No.1 in this appeal also died and his legal representatives have been substituted.

8. The learned counsel, Mr. Mritunjay Kumar Singh No.2, appearing on behalf of the appellant submitted that the learned Court below has wrongly decided issue No.5 in favour of the plaintiff. According to the learned counsel, there had already been partition in the year 1957 between

4 brothers and to prove this fact, the defendant No.1-appelalnt has adduced ample evidence but the learned Court below mis-appreciated the evidence and came to the conclusion wrongly that he continued to be the *karta* till 1964. The learned counsel further submitted that from the impugned Judgment, it is clear that the learned Court below was under wrong impression that because some of the properties have been acquired in the name of 4 brothers in the year 1964, therefore, there was no partition. According to the learned counsel both the parties admitted that there was separation between the 4 brothers. According to the plaintiff, this separation took place in the year 1965 whereas according to the defendant No.1-appellant , this separation took in the year 1957. After separation in the year 1957, all the brothers had no concern with each other. The youngest, Triveni Mahto, was living with plaintiff. Since they all had separate income, some of the properties have been acquired in the name of 4 brothers because they contributed towards the consideration amount. Some of the properties have been acquired by them separately either in their own name or in the name of their wife or children. The defendant No.1 was working as Amin since 1937 and had considerable amount of income from his work of Amanat. He maintained the family out of his income from his work as Amanat since 1943 when their father died, till 1953 when the joint family properties came in possession of the parties. Because the defendant No.1 was maintaining the family out of his own income after the death of their father, late Laxmi Narayan Mahto, he could not acquire any land during this period. When the property came in their possession in 1953, the family was maintained out of the joint family property and the defendant No.1 remained as *karta* till 1957. The plaintiff became teacher in 1954 and he was not giving money to the joint family

and demanded partition of the joint family property after some time, therefore, a complete partition took place in 1957. The learned Court below has not properly appreciated the evidences adduced by the parties and has given wrong finding that the properties have been acquired out of the joint family nucleous.

9. The learned counsel further submitted that the plaintiff and the supporting defendants and the other witnesses have clearly admitted that parties are in possession of equal share of the ancestral property and also the property which stands in the name of 4 brothers. The witnesses have also admitted the fact that the property which is standing in the name of defendant No.1 is in possession of the defendant No.1. The witnesses have also admitted in the evidence that the properties which have been acquired by the plaintiff and defendant No.2 & 3 either in their name or in the name of their sons and wives have not been included in the present suit but the learned Court below wrongly decreed the plaintiff's suit. The learned counsel further submitted that the acquisition of some property in the name of 4 brothers after 1957 is not the conclusive proof of the fact that the defendant No.1 continued to be *karta* of the joint family till 1965. It is in consonance with the case of the defendant No.1 because some of the properties have been acquired in the name of defendant No.1 alone and some of the properties have been acquired in the name of 4 brothers because they contributed equally. It is not inconsistent with the case of the defendant No.1 but the learned Court below has mis-construed this fact. The learned counsel for the appellant further submitted that since the property was standing in the name of defendant No.1, he sold the same to one Updesh Singh in the year 1973 which was never objected by any brother and for the first time in the year 1995 after such a long period, it is

contended by the plaintiff and the supporting defendant that it was joint family property without making Updesh Singh as party in the suit. The learned counsel further submitted that originally the suit was filed for partition of the property standing in the name of defendant No.1 and 4 brothers only which indicate clearly that there had already been partition between the 4 brothers regarding the ancestral property which have been introduced by amendment in Nov., 1997. According to the learned counsel, if there had been separation between the 4 brothers in the year 1957 then there is no question of joint family nucleous. The plaintiff has made out a case that there was separation in the year 1965 only with a view to grab the self-acquired property of the defendant.

10. The learned counsel for the appellant further submitted that the learned Court below has wrongly held that the property which are standing in the name of defendant No.1 and the property which has been transferred by defendant No.1 in the year 1973 are also joint family property in spite of the fact that the defendant has adduced overwhelming evidence to show his income from the work of Amin. Since the brothers had separated in the year 1957 itself, there was no question of joint family nucleous arises. On these grounds, the learned counsel for the appellant submitted that the impugned Judgment and Decree are liable to be set aside and the plaintiff suit be dismissed.

11. On the other hand, the learned counsel, Mr. Sandeep Mishra, appearing on behalf of the respondent submitted that the learned Court below has properly dealt with all the points raised by the appellant and has given good reasons for his findings, therefore, the findings cannot be interfered with in this First Appeal. The learned counsel submitted that the defendant No.1 had no separate source of income and the joint family

property was about 29 and odd acres which had sufficient income and out of the said income, the properties have been acquired till 1964 and then the parties separated in mess and cultivation according to their convenience only. There had been no partition between the 4 brothers. The defendant No.1 acquired the property out of the joint family nucleous in his name as well as in the name of 4 brothers. The learned court below has considered all these aspects of the matter and also has dealt with the evidences and found that the defendant No.1 was *karta* till 1965. On the basis of all these grounds, the learned counsel submitted that the First Appeal is liable to be dismissed.

12. In view of the above rival contentions of the parties, following points arises for consideration in this appeal :

(i) Whether the defendant No.1 was *karta* of the joint family consisting of his brothers till 1956-57 or 1964-65.

(ii) Whether properties standing in the name of defendant No.1 are self-acquired property of defendant No.1 or the said lands are joint family property?

(iii) Whether there had been complete partition between the parties in the year 1957 as alleged by the defendant No.1 or the parties only separated in mess and cultivation according to their convenience in 1965 as alleged by the plaintiff and whether there is unity of title and possession between the parties?

13. According to the plaintiff's case, the parties separated in mess and cultivation only in the year 1965, there is no partition by metes and bounds with regard to the suit property. According to the defendant No.1, there had been complete partition with regard to the ancestral property in the year 1957. After partition in the year 1957, the parties have acquired separate properties in their respective names or in the name of their family members. The parties have also acquired properties jointly on contribution and they have partitioned the properties which were acquired in the name

of 4 brothers on contribution and they are in possession of their respective shares. From the above pleadings of the parties, it is clear that severance of joint family status is admitted by both the parties. It is also admitted that one Kamla Prasad had taken delivery of possession of the ancestral property in title money suit No.7 of 1940. The ancestral property reverted back in possession of the 4 brothers jointly in the year 1953. According to the plaintiff, their father, late Laxmi Narayan Mahto died in 1949 whereas according to the defendant No.1, he died in 1943. Be that as it may after death of Laxmi Narayan Mahto, it is admitted that defendant No.1 was the *karta* of the family. According to defendant No.1, he remained as *karta* till 1956-57 till partition took place amicably whereas according to the plaintiff, he remained *karta* till 1965. Now, if the case of plaintiff is accepted that the defendant No.1 remained *karta* till 1965 then the question will arise as to whether prior to 1965, the properties which have been acquired in the name of defendant No.1 is self acquired property of defendant No.1 or joint family property acquired out of the income from joint family property. If the case of the defendant No.1 is accepted then there is no question of joint family property or fund arise and, therefore, the consideration of self-acquisition of joint family property will become redundant. Therefore, this question as to whether there has been partition in the year 1957 or whether the parties separated only in mess and cultivation in 1967 is important one. To prove this fact, the parties have adduced evidence.

14. Prior to dealing the evidences adduced by the parties, the background regarding pleading with this regard may be looked into. From perusal of the plaint, it appears that originally the suit was filed for partition of Schedule 'A' land only. Schedule 'A' lands stands in the name of defendant No.1 and some land in the name of 4 brothers. These properties

were acquired between the year 1957 to 1964. This fact is evident from the pleading at paragraph 4 and paragraph 8 of the plaint. However, it appears that subsequently amendment was prayed for and ancestral properties were included in Schedule 'B' total measuring 29.54 acres after two years of the institution of the suit. From perusal of the evidence of the plaintiff, P.W.4, it appears that at paragraph 22, he has admitted that originally the lands standing in the name of defendant No.1 were only included in the suit for partition and subsequently, the ancestral properties have been added. From perusal of paragraph 21, it appears that the plaintiff P.W.4 has further admitted that 4 brothers are in possession of 1/4th each on the property which were purchased in the name of 4 brothers. At paragraph 22, it has further been admitted that the property which standing in the name of Awadh Bihari Mahto, defendant No.1, is in possession of defendant No.1. He has said that when he demanded partition of that property, he refused. At paragraph 18 of his evidence, he has further admitted that all the brothers are in possession of 7 or 8 acres of ancestral property. We have seen above that the ancestral property added subsequently in Schedule 'B' of the plaint measuring 29.54 acres. If it is divided in 4 parts equally, then in the share of one brother, there will be 7 acres and odd decimal. This fact is admitted by the plaintiff himself. Now, therefore, it becomes admitted fact that all the brothers are in possession of the ancestral property equally to the extent of 1/4th share and they are also in possession to the extent of 1/4th of the property which have been purchased in the name of 4 brothers. Only difference is that according to the plaintiff, they are coming in separate possession since 1965 whereas according to the defendant No.1, this separation came in the year 1957.

15. ***In A.I.R.1971 Patna 215 Arjuna Mahto & Ors Vs. Monda Mahain, a Division Bench of this Court has held*** that separation in food and residence for a long time among the brothers of a Hindu family, independent transaction of property, separate possession and enjoyment of properties are by themselves, no doubt, not conclusive but the cumulative effect of such facts may show that there had been partition between the brothers. Admittedly, in this present case, all the brothers have acquired properties separately as has been admitted by the plaintiff and other witnesses in the evidence. As stated above, they have also admitted that they are in separate possession of the ancestral property equally. As stated above only the difference is as claimed by the plaintiff since 1965 and as claimed by the defendant, it is since 1957. Be that as it may since more than 30 years, the parties are separate in mess, cultivation and are also acquiring the property independently in their names and, therefore, in view of the Division Bench decision referred to have presumption is in favour of the partition of the properties. This presumption is strengthened because of the fact that originally only the property which are standing in the name of defendant No.1 and the property which are standing in the name of 4 brothers were included in the partition suit. Further, the plaintiff himself admitted that the parties are in possession of equal share, i.e. 1/4th share in the property which are standing in the name of 4 brothers acquired jointly. In view of the above facts and circumstances of the case pleaded by the defendant No.1 that there had been partition of the joint family property appears to be correct. The only difference is about the separation whether it is in 1957 or in 1965.

16. Now, let us consider the evidence about the separation pleaded by the parties. P.W.1 has stated that he and his brothers sold the

properties measuring 2 acres 72 decimal to defendant No.1 and at that time there had been no partition between the 4 brothers and Awadh Bihari Mahto who was the *Karta*. This witness is of different village. In the cross-examination at paragraph 6, he has admitted that he cannot say as to whether Awadh Bihari Mahto has paid his own money or joint family. Therefore, the evidence of this witness who is of different village cannot be relied upon regarding the fact that Awadh Bihari Mahto was the *karta* of the joint family when the property was sold by this witness.

17. P.W.2 has stated that till 1965, the parties were joint and, thereafter they separated in mess. In the cross-examination at paragraph 4, he has admitted that there is enmity between the defendant No.1 and this witness. He has stated that his son had given notice to Pankaj Kumar Mahto grand son of Awadh Bihari Mahto to vacate his land. At paragraph 6, he has again admitted that he is not in visiting term with Awadh Bihari Mahto, defendant No.1. In such circumstances, the evidence of this witness is also not reliable. P.W.3 has also stated that he has sold property to Awadh Bihari Mahto and at that time, Awadh Bihari Mahto and his brothers were joint. This witness is also of different village. P.W.4 is the plaintiff himself. These are the oral evidence adduced on behalf of the plaintiff. It may be mentioned here that since the separation is admitted, it was for the plaintiff to prove the fact that in fact the separation was in the year 1965 and not in the year 1957. As discussed above, the oral evidence adduced by the plaintiff is not sufficient to come to a finding that in fact they remained joint till 1965.

18. Ext.2/D dated 28.05.1958 and Ext. A-2 sale deed of the year 1964 in the name of 4 brothers have been proved in this case. The learned counsel for the respondent submitted that had there been separation

between the 4 brothers in the year 1957, there was no question of acquisition of property in the name of 4 brothers. So far this submission is concerned, it appears that the learned Court below also gave much emphasis on these points. It may be mentioned here that in the year 1964, the defendant No.1 also purchased property in his own name. In the year 1957-58 and in the year 1959 and also in the year 1964, the defendant purchased property in his own name. Therefore, admittedly in between 1957 to 1965, properties have been purchased in the name of defendant No.1 and also in the name of 4 brothers which clearly indicate that there was separation prior to acquisition of these properties. If the properties were joint, the other brothers should have objected to the acquisition of property in the name of defendant No.1 alone. It is not the case that some properties were acquired in the name of one brother and some properties were acquired in the name of other brother. Admittedly, some properties have been acquired in the name of defendant No.1 alone and some properties in the name of 4 brothers. In such circumstances, the presumption will be that the 4 brothers contributed together, therefore, the properties have been acquired in the joint names. This case is consistent with the case of the defendant No.1.

19. The defendant has also adduced evidence in support of his case. Defendant No.1 has been examined as D.W.6. He has fully supported his case of complete partition in the year 1957. He has stated that in the year 1954, the plaintiff became the teacher and he was not contributing anything towards the family and demanded partition. So, partition was affected and since then the youngest brother defendant No.3 remained with plaintiff. The plaintiff in his evidence P.W.4 has admitted that he never contributed anything. D.W.6 has further stated that because the 4 brothers contributed

the properties have been acquired jointly in the name of 4 brothers. There is no reason as to why the evidence of D.W.6 be not relied upon. Likewise, the other witness D.W.2 has also stated that 40 years ago, there had been partition between the 4 brothers. The learned trial Court disbelieved the evidence of this witness on the ground that he is unable to say the exact year. It may be mentioned here that the plaintiffs witnesses have clearly mentioned in their evidence that till 1965, the 4 brothers remained joint. It will not be out of place to mention here that the suit has been filed in the year 1995 and the witnesses have been examined in the year 1998. It is not possible for stranger to the family to say or remember the exact year of separation. The Court should not insist arithmetically calculated evidence in civil cases. However, in this case since the witnesses have given the exact year of separation which clearly indicates that they are either tutored or have enmity as has been admitted by P.W.2. On the contrary, the evidence of D.W.2 appears to be plausible who is of the same village. D.W.6 is also reliable.

20. From perusal of the impugned Judgment, it appears that the learned Court below has not given any cogent and acceptable reason for not relying D.W.2 and D.W.6. The learned Court below while relying the evidence of P.W.2 had not considered the cross-examination part wherein he has admitted the enmity between the parties as has been discussed above. It further appears that the learned Court below has given much emphasis to the fact of acquisition of property in the name of 4 brothers in the year 1964. In my opinion, only because the properties have been acquired in the name of 4 brothers in the year 1964, there cannot be any presumption that the brothers were joint till 1964. On the contrary since the parties themselves have admitted that they were separate, the

properties were acquired in the name of 4 brothers. As stated above only dispute is year of separation. It further appears that the learned Court below has given much emphasis on the evidence adduced on behalf of the defendant-second parties, the youngest brother who is admittedly living jointly with plaintiff.

21. In view of my above discussion, I find that the defendant No.1-appelalnt has been able to prove his case of separation in the year 1957. The finding of the learned Court below on this point is, therefore, reversed.

22. The next important question will be that whether there was complete partition or only separation in mess and cultivation. So far this question is concerned also, it must be answered in favour of the defendant No.1-appellant and against the plaintiff-respondent because admittedly the parties are in possession of the properties equally since 1957 as has been seen above. The suit has been filed in the year 1995. In the meantime in 1973, the defendant No.1 has also sold some property. No case is made out that the share allotted to any of the brother is so small and less area that it is shocking to the conscience of the Court. As has been discussed above, the plaintiff and other witnesses have stated that they are in possession of equal area. Further, originally, the ancestral properties were not included for partition which further indicates that there had been partition. Therefore, taking into consideration that the parties were separate in mess, cultivation, worship, for more than 3 decades and were acquiring properties and also selling the properties, cumulative effect of these matters clearly proves that there had been complete partition between the parties. The learned Court below has not at all considered all these aspects of the matter. I, therefore, find that there had been complete partition between the parties in the year 1957 regarding the

ancestral and joint property. The finding of the learned Court below of this point is, therefore, reversed.

23. So far self-acquisition claimed by defendant No.1 is concerned, now the question becomes academic only because I have held above that there had been complete partition in the year 1957 as claimed by the defendant No.1. Admittedly, all the properties standing in the name of defendant No.1 has been acquired after this partition claimed by the defendant No.1. In such circumstances, there is no question of joint family fund or nucleous arises. I, therefore, find that the properties which standing in the name of defendant No.1 is self-acquired property. Likewise, the properties sold by defendant No.1 was also his self-acquired property. There is no reliable evidence that the 4 brothers were in joint possession of the property standing in the name of defendant No.1.

24. Considering the above facts and circumstances of the case, I find that there is no unity of title and possession between the parties. The finding of the learned Court below of this point is, therefore, reversed.

25. In the result, this First Appeal is allowed and the impugned Judgment and Decree are set aside and the plaintiff's suit for partition is dismissed. In the facts and circumstances of the case, the parties shall bear their own costs.

(Mungeshwar Sahoo, J.)

Patna High Court, Patna
The 28th day of June, 2011
Sanjeev/.N.A.F.R.